In the Supreme Court

of the

United States

October Term 1974

No.....

PHOEBE WILSON DILLON,

Petitioner,

vs.

ANTLER LAND COMPANY of Wyola, a Montana corporation; LITTLE HORN LAND COMPANY, a Montana Corporation; ANTLER LAND COMPANY, a Montana corporation; LITTLE HORN LAND AND LIVESTOCK COMPANY, a Montana corporation; UNION BANK AND TRUST COMPANY, Executor of the ESTATE OF BERTHA TSCHIRGI; REX HIBBS, Executor of the ESTATE of F. M. TSCHIRGI; FRANCIS J. MURTHA, as Trustee for TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND; and THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NONGOVERNMENTAL RESPONDENTS IN OPPOSITION

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INDEX OF CONTENTS

Page

STATUTES INVOLVED 2

A. General Statutes of United States Applicable 2

B. Special Statutes of United States Applicable 2

C. Legislative History 3

D. Montana Statutes Applicable 4

QUESTIONS PRESENTED 4

STATEMENT 6

ARGUMENT AND LEGAL AUTHORITY 10

CONCLUSION 25

STATUTES OF UNITED STATES

Page

Montana's Enabling Act of *1889, 25 Stat. 676* 2, 10

Act. of *May 8, 1906, 34 Stat. 182; 25 U.S.C. 349* 2, 5, 6, 7, 8, 10, 11, 21

Crow Allotment Act of *June 4, 1920, 41 Stat. 751* 2, 7

a. *Legislative History see* Appendix A, B 3, 4, 5, 11-15

Crow Act of *May 26, 1926, 44 Stat. 658* 2, 8, 14, 15, 21

a. *Legislative History,* Appendix C 4, 10-14

MONTANA STATUTES

Revised Codes of Montana, 1947

§93-2504 22-23

§93-2505 22-23

§93-2507 - §93-2513 22-23

UNITED STATES SUPREME COURT CASES

Burke v. S.P. 1913, 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1527 20

Dickson v. Luck Land Company, 1916, 242 U.S. 371, 37 S.Ct. 167, 61 L.Ed. 371 11

Engel v. Davenport, 1926, 271 U.S. 33, 46 S.Ct. 410, 70 L.Ed. 813 15

Inhabitants of Montclair v. Ramsdell, 1883, 107 U.S. 147, 2 S.Ct. 391, 27 L.Ed. 431 15

Page

Larkin v. Paugh, 1928, 276 U.S. 431, 48 S.Ct. 366, 72 L.Ed. 640 15

Mercantile National Bank at Dallas v. Longdean, 371 U.S. 555, 83 S.Ct. 520, 9 L.Ed. 2d 523 15

Moore v. Robbins, 1877, 96 U.S. 530 20

N.P. v. McComas, 1919, 250 U.S. 387, 39 S.Ct. 546, 63 L.Ed. 1049 20

Shapiro v. United States, 1948, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 15

Steel v. St. Louis Smelting & Refining Co., 1882, 106, U.S. 447, 1 S.Ct. 389, 27 L.Ed. 226 20

United States v. Menasche, 348 U.S. 528, 75 S.Ct. 513, 99 L.Ed. 615 15

United States v. Powers, 1939, 305 U.S. 527, 59 S.Ct. 344, 83 L.Ed. 330 15

United States v. Waller, 1916, 243 U.S. 452, 37 S.Ct. 430, 61 L.Ed. 483 11

CIRCUIT COURT CASES

Bonds v. Sherburne Mercantile Co., 1948, Mont., 9th C.C., 169 F.2d 433, cert. den. 69 S.Ct. 294 16

Montana Power v. Rochester, 1942, 9th C.C. Mont., 127 F.2d 189 16

Smith v. United States, 1967, 5th C.C., 375 F.2d 243 21

White v. Administrator of General Services, 1965, 9th C.C., 343 F.2d 444 21

DISTRICT COURT CASES

Page

Falls Land and Gravel Co. v. Western Concrete, Inc., 1967, D.C. Mont., 270 F.Supp. 495 23

Parker v. Kennedy, 1963, S.D. N.Y., 212 F.Supp. 594 21

Southport Land et al, v. Udall, 1965, Calif. S.D. 244 F.Supp. 172 21

MONTANA SUPREME COURT CASES

Baum v. N.P., 1918 55 Mont. 219, 175 Pac. 872 23

Berger v. Johnson, 1944, 116 Mont. 270, 151 P.2d 586 23

Fitschen Bros. Commercial Co. v. Noyes, 1926, 76 Mont. 175, 246 Pac. 773 23

Hentzy v. Mandan Loan et al, 1955, 129 Mont. 324, 286 P.2d 325 23

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BRIEF OF NONGOVERNMENTAL RESPONDENTS IN OPPOSITION

STATUTES INVOLVED

A. *GENERAL STATUTES OF UNITED STATES APPLICABLE.*

1. General Allotment Act; *February 8, 1887; 24 Stat. 388,* See *25 U.S.C. 339, 348, 353.*

2. Montana's Enabling Act; *February 22, 1889;* Accepted *October 1, 1889; 25 Stat. 676.*

3. *May 8, 1906; 34 Stat. 182, 25 U.S.C. 349,* amending General Allotment Act.

B. *SPECIAL STATUTES OF UNITED STATES APPLICABLE.*

1. Crow Allotment Act of *June 4, 1920; 41 Stat. 751.*

Note that *Section 1* provides that allotments made shall vest title in the allottee evidenced by "patents in fee to competent Indians * * * but by trust patent to minors and incompetent Indians, the force and legal effect of the trust patents to be as prescribed by the General Allotment Act of *February 8, 1887, (Twenty Fourth Statutes, page 388).*"

The legislative history suggests Congressional intent to subject the legal effect of patents in fee to competent Indians as provided by the Amendments to the General Allotment Act including in particular the *1906* Amendment, now *25 U.S.C. 349,* as construed by this Supreme Court in *1916.*

2. *May 26, 1926; 44 Stat. 658.*

Note that *Section 1* of the Crow Allotment Act of *1920* was purposely amended to provide that allotments made vested title in the allottee "evidenced by patents in fee to competent Indians * * * but by trust patents to minors and incompetent Indians,

> the force and legal effect of the trust patents to be as is prescribed by the General Allotment Act of *February 8, 1887, as amended* * * * ; thus expressly providing in *Section 1* of the Crow Act that all patents issued thereafter clearly had the legal force and effect as provided by *25 U.S.C. 349.*

C. *LEGISLATIVE HISTORY.*

We can refer the Court to only that part of the pertinent legislative history which has been made known to us. We have no source for such material in the State of Montana.

All reports in *1919* were 66th Congress, 1st Session. Those in *1920,* 66th Congress, 2nd Session. Those in *1926,* 69th Congress, 1st Session.

1. *September 23, 1919.* Senate Report No. 219, Calendar No. 183, to accompany #2890, "Crow Tribe of Indians of Montana."

2. *October 20-22, 1919, pp. 7173-7175, pp. 7316,* Senate Congressional Record.

3. *November 5, 1919,* House Hearings Before a Subcommittee of the Committee of Indian Affairs, *pp. 12-47,* "Indian Tribes of Montana." See excerpts in *Appendix A.*

4. *November 24, 1919,* House Report No. 468, to accompany #2890, "Allotment of Land, Crow Tribe of Indians."

5. *February 5, 1920,* House Congressional Record, *pp. 4016-4018.*

6. *March 19, 20, 1919,* House Hearings of Committee on Indian Affairs, *pp. 1-112,* "Crow Tribe of Indians in Montana."

7. *April 5, 1920,* to accompany #2890, House Report No. 789, "Allotment of Lands of the Crow Tribe for the Distribution of Tribal Funds.

8. *April 22, 1920,* excerpts from House Congressional Record explaining the purpose of the Bill after it had been finalized by Committee Hearings. *Pp. 5990* through *6001; 6006* through *6012* (See excerpts in *Appendix B*); *pp. 7844* through *7846; 7874.*

9. *February 8, 1926,* House Report No. 228 on Act to Amend Crow Act of *June 4, 1920,* incorporated in later Senate Report 639, Calendar No. 635, "To Amend Sections 1 * * * of an Act approved *June 4, 1920,* * * *" (*See Appendix C*).

10. *May, 1926,* Senate Congressional Record, *pp. 9073.*

D. *MONTANA STATUTES APPLICABLE.*

R.C.M. 1947—Sections 93-2504; 93-2505; 93-2507 through *2513.*

QUESTIONS PRESENTED

The factual conditions precedent for grant of certiorari required by Supreme Court *Rule 19(1)(b)* do not exist in this case. The decision by the Ninth Circuit Court is wholly consistent with prior decisions by

this Supreme Court on comparable fact and legal issues. There is no decision to the contrary by any Court considering a comparable fact situation.

Furthermore, we do not agree that the Petition accurately presents the controlling issues. On *September 15, 1955,* pursuant to statutory authority, the government of the United States issued to petitioner a patent in fee only after a very careful, very thorough, very exhaustive administrative investigation. It has never been set aside. There is no factual basis upon which it could be set aside.

1. Is there any case law, or any statute, that authorizes this petitioner to collaterally attack and set aside the patent in fee which the United States issued to her?

2. Whether or not the United States shall in any case file an action to set aside a patent in fee is a sovereign prerogative of the United States to decide. Is there any statute or case law authority that authorizes this petitioner to collaterally mandamus the United States to make that sovereign governmental decision?

3. As long as that patent in fee of *September 15, 1955,* remains outstanding, it carries this statutory legal effect provided by *25 U.S.C. 349*—the title previously vested in the United States was extinguished; all restrictions upon sale, incumbrance, or taxation were removed from the lands; petitioner became a citizen of the United States with all the privileges and immunities of such citizenship; petitioner at all times thereafter

was entitled to the benefit of, and subject to, Montana State law. The warranty deed of *October 6, 1955,* which petitioner now seeks to vitiate was executed by petitioner (and her husband never made a party to this action) *subsequent to* the vesting and acquisition of such rights of property and citizenship.

It is unnecessary in this case to determine whether or not that deed was valid, because in any event in the 14½ years between the execution and delivery of the deed on *October 6, 1955,* and the commencement of this action on *June 20, 1970,* respondents acquired title under Montana law by adverse possession, and petitioner in addition is barred by Montana State Statutes of Limitation.

Where is there any statutory or case law authority to the contrary on comparable facts?

STATEMENT

In *1889* Congress provided in Montana's Enabling Act that the jurisdiction of the United States over Indian land would terminate when the title of the United States was extinguished.

In *1906* Congress amended the General Allotment Act of *1887* by what is now *25 U.S.C. 349.* The Secretary of Interior was authorized to issue to an Indian allottee a patent in fee simple whenever, in his discretion, he deemed the Indian allottee to be competent and and capable of managing his or her affairs. The stat-

ute provided that upon issue of the patent in fee the title of the United States was thereby extinguished, and the competent Indian allottee was immediately vested with the rights of property and citizenship described above under question No. 3. In *1916*, in two decisions, this Court construed *25 U.S.C. 349*, and gave full force and effect to the Congressional intent.

The legislative history preceding the passage of the Crow Allotment Act of *June 4, 1920*, reflects that between *1906* and *1920 a* substantial percentage of the Crow Reservation adult Indian population had already been declared competent under *25 U.S.C. 349*; had already received patents in fee thereunder; the fee title of the United States had been divested; and each such competent Crow Indian patentee had already been vested with the rights of property and citizenship provided by the statute (See *Appendix A*). In addition this Court construed the intent of that statute in two decisions in *1916*. Backed by those facts, Congress provided in *Section 1* on *June 4, 1920*, that the allotments would be evidenced by patents in fee to competent Indians, but by trust patents to minors and incompetents of the legal force of the General Allotment Act. It did not specify the legal force and effect of a patent in fee. There was no need. Such had already been provided in the language of *25 U.S.C. 349*, in the holdings by this Court in the two decisions in *1916*, and by the prior granting of all such rights to a substantial proportion of the adult

Indians in the Crow Reservation. Careful study of the legislative history preceding the *1920* Act indicates that it was the Congressional intent to continue to give the same rights to competent Indians receiving patents in fee under the provisions of *Section 1* of the Act of *June 4, 1920.*

In any event, if there was any doubt, Congress removed that doubt when it amended *Section 1* in *1926.* The Congressional purpose was to clarify in the minds of the Indians that their trust patents would not only have the legal force and effect of the *Act of 1887,* but that they would have the legal force and effect of that statute and *all amendments thereof up to 1926* (See *Appendix C*). Congress purposely and intentionally incorporated in *Section 1* on *May 26, 1926,* that Crow Allotment patents thereafter would have the legal force and effect of *25 U.S.C. 349.* This Court so held in *1939* in the *Powers* case discussed later.

After a thorough, exhaustive, administrative investigation in which nongovernmental respondents played no part, patent in fee issued to petitioner, a competent adult Crow Indian, on *September 15, 1955.* Upon that date by reason of the issue of the patent in fee, petitioner acquired all rights under the express provisions of *25 U.S.C 349* incorporated in *Section 1* of the Crow Act. of *May 26, 1926,* as construed by this Supreme Court.

The patent in fee has never been set aside. There are no facts that would warrant even the United States to request it be set aside. It still stands as a valid, subsisting, governmental patent in fee.

There is no statutory nor case authority that authorizes the petitioner to individually assume and exercise the sovereign prerogatives of the United States, and to collaterally attack and set aside a governmental patent in fee, nor change the provisions of the statute under which it was issued.

There is no statutory nor case authority authorizing the petitioner to directly, or indirectly, in a collateral action such as this one, to mandamus the United States to directly attack the validity of a patent in fee.

October 6, 1955, subsequent to the issue and delivery of the patent in fee, petitioner *and her husband* executed and delivered the warranty deed which petitioner 14½ years later as of *June 20, 1970,* now seeks to set aside. The deed was duly recorded in Montana State recording offices on *October 14, 1955.* Petitioner has admitted that from that date on state officials have levied, assessed, and collected from nongovernmental respondents all state property taxes; that with the initial acquiescence, consent, and subsequent actual knowledge of petitioner, nongovernmental respondents entered upon and occupied the land under that warranty deed, have claimed title thereunder, and have occupied and used the lands for the normal use capabilities of the land.

It was not until more than 14½ years later that petitioner on *June 20, 1970,* commenced this action to collaterally attack and set aside the patent in fee; to vitiate the deed; and to recover the land.

Respondents believe the warranty deed of *October 6, 1955,* was and is a valid, legal conveyance. It is unnecessary to determine that issue in this case. With the patent in fee simple issued to petitioner on *September 25, 1955,* still valid, and subsisting, fee title then vested in petitioner; the legal title of the United States was and is extinguished; all restrictions on sale, incumbrance and taxation were removed; petitioner's property rights thereafter were governed by Montana law. Under Montana law the nongovernmental respondents are the legal owners of the property.

ARGUMENT AND LEGAL AUTHORITY

February 22, 1889, 25 Stat. 676, Congress provided in the Montana Enabling Act that individual or tribal Indian lands within Montana would remain subject to the disposition of the United States "until the title thereto shall have been extinguished by the United States."

By the General Allotment Act of *1887* as amended *May 8, 1906, 24 Stat. 182, 25 U.S.C. 349,* Congress provided that whenever the Secretary of Interior, in his discretion, is satisfied that an Indian is competent and capable of managing his or her affairs, the Secretary may cause to be issued to such allottee a patent in fee

simple, and the allottee thereby acquires the rights of citizenship and property spelled out in the statute. The legal effect of a patent in fee simple issued to a competent Indian allottee was construed and spelled out in *1916* prior to the Crow Allotment Act of *1920* by two decisions of this Court:

> *Dickson v. Luck Land Company, 1916, 242 U.S. 371, 37 S.Ct. 167, 61 L.Ed. 371;*
>
> *United States v. Waller, 1916, 243 U.S. 452, 37 S.Ct. 430, 61 L.Ed. 483.*

The legislative history of the *Crow Act of 1920* discloses that a substantial percentage of the Adult Indian population of the Crow reservation had already been adjudged competent, had already received patents in fee simple between *1906* and *1920,* and were already vested with the citizenship and property rights provided by this *1906* statute (*25 U.S.C. 349*) when the Crow Act was promulgated on *June 4, 1920.* (See *Appendix A, pp. 16, pp. 39-40*)

The earliest legislative hearings pertinent are the House Hearings of *November 9, 1919* (See *Appendix A*). The Crow Act which had passed the Senate on *October 23, 1919,* is set out at *pages 43-47* of that Report, and contains the same controlling language in both *Sections 1* and *2* that persisted all through the legislative proceedings until the amendment of *Section 1* on *May 26, 1926.* Allotments were to be evidenced by patents in fee to competent Indians, but by trust patents to mi-

nors and incompetents of the legal effect of the Act of *1887*. There was no need to spell out the legal force and effect of a patent in fee to a competent Indian in *Section 1* of the Act of *1920*. Such was spelled out in unambiguous language in *1906* in the general law *25 U.S.C. 349*; that statute had been twice construed by this Court in *1916;* a substantial proportion of the competent adult Crows had already received patents in fee under *25 U.S.C. 349,* and vested with the rights therein provided.

The legislative history subsequent to those Hearings of *November 5, 1919,* does not suggest any different Congressional intent. House Hearings occurred on *March 19, 20, 1919,* and take up 112 pages in which they discuss various changes in various sections. The The only discussion with respect to *Section 1* appears in *pages 1* through *8*. The only changes suggested were changes in the geographical location of lands desired reserved for the tribe and lands desired open for allotment, nothing else. More than *90* pages were devoted to *Section 2,* and the intention of Congress to protect the noncompetent, trust allottee, Indian lessors from forced sales of their leased trust lands to the large acreage lessors of those trust lands. No changes were made in the controlling language which had passed the Senate on *October 23, 1919.* Not one single, solitary word in that 90-page discussion of *Section 2* refers to competent Indians, or patents in fee, nor to altering or changing

those rights inherent in the provisions of *Section 1* that allotments would be evidenced by patents in fee to competent Indians. The fact that the matter of competency, and the legal force and effect of a patent in fee to a competent Indian, were never mentioned nor discussed nor touched upon in any of the discussions pertaining to *Section 2* in those *Hearings of March 19, 20, 1920,* makes all the more significant the subsequent legislative history where Congress did discuss what was intended for the competent Indians receiving patents in fee.

After the Committee Hearings, and after the Bill was finalized by Committees, it was reported out of Committee to Congress, and the purpose and intent of Congress with respect to the rights of competent Indians receiving a patent in fee stands out like a sore thumb (See excerpts in *Appendix B*). Careful analysis of this legislative history in its entirety suggests a clean cut intent by Congress in *Section 1* of the Act of *June 4, 1920,* to authorize the issue of patents in fee to competent Indians, and that such would be governed by the provisions of *25 U.S.C. 349.*

Is it a credible conclusion in face of all the overwhelming evidence to the contrary that Congress would create such a potential hot bed of havoc, friction, and dissatisfaction on the same reservation by giving half of the competent Crow Indians receiving patents in fee unrestricted rights of property and citizenship between *1906* and *1920,* and then turn around in *1920* and take

them away from the other half possessing all the same, identical qualifications for such rights? Any doubt was necessarily removed in *1926*.

Congress on *May 26, 1926,* amended *Section 1* of the Crow Act of *1920* by *44 Stat. 658* to provide expressly that allotments would be evidenced by patents in fee to competent Indians, but by trust patents to minors and incompetents which trust patents shall have the legal force and effect of the General Allotment Act of 1887, *"as amended."* The purpose specifically stated in both House Committee Report and Senate Committee Report was:

> "This bill contemplates amending sections 1, 5, 6, 8, and 18 of an act approved *June 4, 1920* (41 Stat. L. 751-757), affecting rights of the Crow Tribe of Indians of Montana.
>
> The first change in section 1 of the act appears in line 5 of page 3, where the words, 'as amended' have been added for the purpose of clarifying in the minds of the Indians that the trust patents issued in pursuance thereto shall have the force and legal effect as prescribed by the act known as the 'General Allotment Act' of *February 8, 1887,* as amended up to the present. The addition of these two words will not in any way affect existing law. * * * *" (*See Appendix C*)

Furthermore, Courts accept the fact that Congress was fully aware of the meaning of the language employed, of the prior construction of the incorporated statute by this Supreme Court in *1916,* and that when Congress in *1926* provided expressly that the legal force and effect of trust patents would be as provided in *25*

U.S.C. 349, Congress knew and intended to incorporate the prior construction of the statute by this Court.

Shapiro v. United States, 1948, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed 1787;

Engel v. Davenport, 1926, 271 U.S. 33, 46 S.Ct. 410, 70 L.Ed. 813;

Inhabitants of Montclair v. Ramsdell, 1883, 107 U.S. 147 at 152, 2 S.Ct. 391 at 395, 27 L.Ed. 431;

United States v. Menasche, 1955, 348 U.S. 528, 75 S.Ct. 513, 99 L.Ed. 615; and

Mercantile National Bank at Dallas v. Longdean, 1963, 371 U.S. 555, 83 S.Ct. 520, 9 L.Ed. 2d 523.

In two decisions subsequent to *1926*, this Court adhered to the same construction of *25 U.S.C. 349* with respect to the legal force and effect of a patent in fee to a competent Indian as this Court had previously rendered in the two decisions in *1916.*

Larkin v. Paugh, 1928, 276 U.S. 431, 48 S.Ct. 366 72 L.Ed. 640; and

United States v. Powers, 1939, 305 U.S. 527, 59 S.Ct. 344, 83 L.Ed. 330; involving patents in fee and subsequent conveyances on the Crow Reservation;

In the *1939* decision, the *Powers* case, patents in fee had issued to competent Crow Indians both before *1920* and after *1926.* Subsequent to the issue of those patents in fee, the competent Indian patentees had sold their patented land, the facts of this case, and to some of the same respondents in the case. The specific issue involved was the nature and extent of the fee simple title arising out of the patent in fee by reason of *25*

U.S.C. 349, and whether or not water rights accompanied those subsequent conveyances as an incidence of the fee simple title.

See also:

Bonds v. Sherburne Mercantile Co., 1948, Mont., 9th C.C., 169 F.2d 433, cert. den 69 S.Ct. 294;

Montana Power v. Rochester, 1942, Mont. 9th C.C. 127 F.2d 189.

Trust patents issued to petitioner on *October 10, 1923* (*T79*), and *January 26, 1924* (*T80*).

December 31, 1948, petitioner, then an adult, applied for a declaration of competency (*T135*); such was recommended by the Statutory Committee on *January 20, 1949* (*T137*); and was officially announced *April 12, 1949,* by the Department of Interior (*T138*).

October 26, 1949, petitioner applied for authority to sell her land (*T139*). The same reason was given as petitioner gave more than five (5) years later when she applied for a patent in fee.

> "My reasons for making application for the sale of the above-described land are:
>
> This land is hill land which is located in a remote area. I want to sell this land and buy other land closer to my husband's land, by doing this it will be an advantage to us. Money can be held as a trust fund and used as proposed."

February 25, 1955, petitioner applied for the issue of a patent in fee (*T120-124*). Note the title:

"APPLICATION FOR A PATENT IN FEE
(Act of May 8, 1906, 34 Stat. 182)"

Note the same reasons previously given in *1949*:

"(e) Set forth fully reasons for requesting a patent in fee, including your plan for use of the proceeds of the sale, if you intend to sell the land. (Use extra sheet, if necessary):

My husband and I run a sheep ranch. My allotment is too far away from the ranch to use. I want to sell my land and use the money to buy some land near our place at Wyola and also to buy some more sheep.

6. I understand that if my application is granted and a fee patent is issued to me, the land will become unrestricted and subject to taxation from the date of issuance of the patent in fee.

I hereby certify that the above is true to the best of my knowledge."

Phoebe Wilson Dillon

(Applicant's signature)

Witnesses to Signature:

DeWitt A. Dillon (T123)

The ability of petitioner to fully understand the effect of her application for the patent in fee, and particularly *No. 6* immediately above her signature, is well revealed by the mute evidence from her own statements of her business success after she was declared competent in *1949*, and the fact that she was an educated woman with an excellent vocabulary and easy command of the English language so readily perceived in the *1932* personal handwritten letter by petitioner from the Flandreau Indian School in South Dakota (*T81-83*); and the two subsequent handwritten letters in *1945* to the Superintendent (*T85-88*).

Also standing out vividly in the record is the nature and extent of the undisputed careful, thorough, painstaking administrative investigation by all departments of the Bureau of Indian Affairs of petitioner's application for patent in fee (*T120-134*), with reasons given by the Superintendent at (*T134*). All reasons and answers given in the application were found to be true and factually sound. There is no evidence and no claim that any agent, servant, or employee of the nongovernmental respondents ever took part in, nor influenced, nor attempted to influence in any way, either the official investigation or the resulting official decision. There is no factual or legal basis to set aside this patent in fee even in a direct attack.

The only false answer in the petition (if it was in fact false) was the answer to 5(c) at *T122*:

"5. General Information:

Have you been asked to procure a patent in fee? *No.*"

Petitioner claims the deceased Matt Tschirgi requested her to apply for the patent in fee (Tschirgi was already deceased when petitioner so stated). If true, this is certainly not the kind nor quantity nor quality of evidence which this Court would require before it would permit even the Government to set aside the patent in fee in a proper direct attack.

May 21, 1955, there was a land agreement between Petitioner and Matt Tschirgi for Antler Land Com-

pany. The Court should note these factual differences between this agreement, and the warranty deed of *October 6, 1955,* which petitioner seeks to vitiate. They were and are very different contracts. The Court will note the agreement was executed by petitioner alone. Her husband who did join in executing the subsequent warranty deed (but who is not a party to this action) was not a party to this prior agreement. This agreement includes the *NW¼ of Section 26* never included in the subsequent warranty deed. This agreement does not include any land in *Section 36* which was later included in the subsequent patent in fee and the subsequent warranty deed (*T11, 12, 101*). They are different contracts. Furthermore, this agreement was never recorded any place; there was never any effort to specifically enforce this agreement; the nongovernmental defendants have never claimed any rights arising out of this agreement; the nongovernmental defendants have never occupied, used, nor claimed the lands thereunder; and no taxes were ever levied, assessed, or collected by reason of it.

September 15, 1955, following a thorough, exhaustive, administrative investigation of the application, a patent in fee simple issued to petitioner (*T101*). Note the language long recognized by all Courts as a conveyance of an unrestricted fee simple title.

> "NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant

> the Land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever. The land covered by this patent is not liable for any debt contracted prior to this date, as provided by *Section 5* of the Act *of February 8, 1877* (*24 Stat., 388, 389*), and the amendatory Acts of *May 8, 1906* (*34 Stat., 182*) and *June 21, 1906* (*34 Stat. 325, 327*).

Upon issue of the patent in fee all title of the United States except such as was expressly excepted and reserved terminated; no one including the petitioner could collaterally assail the validity of the patent; assuming but not conceding facts so warranting, only the United States in a direct action can utilize the Courts to set the patent aside.

> *Burke v. S.P., 1913, 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1527;*
>
> *Moore v. Robbins, 1877, 96 U.S. 530;*
>
> *N.P. v. McComas, 1919, 250 U.S. 387, 39 S.Ct. 546, 63 L.Ed. 1049;*
>
> *Steel v. S. Louis Smelting & Refining Co., 1882, 106 U.S. 447, 1 S.Ct. 389, 27 L.Ed. 226.*

Whether or not the United States shall or shall not attempt to set any patent aside is a sovereign prerogative of the United States to decide, acting through its Attorney General. Neither the petitioner nor the Courts can assume that sovereign prerogative, nor directly nor indirectly mandamus the United States to do so.

White v. Administrator of General Services, 1965, 9th C.C., 343 F.2d 444;

Smith v. United States, 1967, 5th C.C., 375 F.2d 243;

Southport Land et al, v. Udall, 1965, Calif., S.D. 244 F.Supp. 172; and

Parker v. Kennedy, 1963, S.D. NY 212 F. Supp. 594.

Crucial controlling facts wholly ignored by petitioner are that the patent in fee of *September 19, 1955,* remains to this date undisturbed as a valid, binding, and subsisting governmental patent, and that all citizenship and property rights vested in petitioner by reason thereof are those determined by the provisions of *25 U.S.C. 349* which Congress expressly provided to be the controlling law in *Section 1* as amended in 1926. The title of the United States was extinguished when the patent issued on *September 15, 1955.* All restrictions on sale, incumbrance or taxation were removed from the land. Petitioner thereafter was a citizen of the United States with all privileges and immunities, entitled to the benefit of, and subject to, Montana Law. Petitioner simply cannot collaterally attack or set that patent aside, nor collaterally change the statutory rights arising from it; and cannot directly nor indirectly mandamas the United States to do so in this collateral attack.

October 6, 1955, petitioner and her husband jointly made, executed, and delivered the warranty deed attacked by petitioner (*T12*). Again we note that this is

a substantially different contract than the agreement of *May 21, 1955.* (See Brief above pp. 18-19)

As disclosed by the affidavit of R. F. Hibbs (*T258-261*), and by admissions of petitioner in response to requests for admission of facts 1 through 10 (*T69-72*); admitted by Response I (*T247*), at all times from the recording of the warranty deed on *October 14, 1955,* proper state officials levied, assessed, and collected from nongovernmental respondents all state property taxes on the land. At all times since the deed the nongovernmental respondents with actual knowledge of petitioner have openly and notoriously claimed title under the deed, and have occupied, and used the lands for their customary land use capability.

The District Court and Circuit Court were clearly correct in holding petitioner barred from recovery under Montana law. All state statutes are from the *Revised Codes of Montana, 1947* and amendments to date.

(1) Appellant is Barred by State Statutes of Limitation.

For the purposes of limitation, the action is deemed commenced by the filing of the complaint on *June 20, 1970* (*93-2401*).

a. Plaintiff was neither seized nor possessed of the property within five (5) years before the commencement of the action (*93-2504* and *93-2505, R.C.M.*).

b. Actions for relief on the ground of fraud or mistake must be commenced within two years of the dis-

covery by the aggrieved party of the facts constituting the fraud or mistake (*93-2607(4) R.C.M.*).

Montana rules applicable in fraud cases are set out clearly in *Falls Land and Gravel Co. v. Western Concrete, Inc., 1967, D.C. Mont. 270 F.Supp. 495.*

(2) Respondents Have Acquired Title By Adverse Possession.

In Montana, the deed, even if it was void, is color of title. The combination of color of title plus user and payment of taxes for the statutory period suffices.

Even without color of title, however, title can be acquired by prescription where as here there was known adverse and notorious occupation, possession and user adversely for the statutory period, coupled with payment of taxes.

93-2507, R.C.M. through *93-2513, R.C.M.;*

Baum v. N.P., 1918, 55 Mont. 219, 175 Pac. 872;

Berger v. Johnson, 1944, 116 Mont. 270, 151 P.2d 586;

Fitschen Bros. Commercial Co. v. Noyes, 1926, 76 Mont. 175, 246 Pac. 773, which carefully differentiates prescription and adverse possession; and which holds that the validity or invalidity of the deed does not preclude the fact that it is good 'color of title'; and

Hentzy v. Mandan Loan & Inv. Co., et al, 1955, 129 Mont. 324, 286 P.2d 325.

(3) Privileges and Immunities, Due Process, and Equal Protection Clauses of United States Constitution.

To deprive the present owners of their property

would be a violation of the law of eminent domain, a taking of property without due process of law, a denial of the rights of both petitioner and respondents under the privilege and immunities clause, the due process clause, and the equal protection of the law clause, of the U.S. Constitution. See *U.S. Constitution, Article IV, 2; Amendment 5;* and *Amendment 14.*

It would unduly extend this brief to individually analyze and negate each of the case decisions relied upon by petitioner. Each has the same fatal defect. They simply do not involve the same controlling facts that exist in this case, nor the same granting Indian legislation. For example, these tribes are expressly excepted from the provisions of *25 U.S.C. 349*—Cherokees; Creeks, Choctaws, Chickasaws; Seminoles; Osage; Miamies; Peorias; Sacs and Foxes; Seneca Nation; *(Title 28 U.S.C. 339)*; plus the Five Civilized Tribes in Oklahoma (*Title 28 U.S.C. 353*). Cases cited by petitioner derive from many of these tribes. Each one involves the legal validity of conveyances by noncompetent Indians *before* a patent in fee issued, and while the legal title *still vested in the United States* in trust for noncompetent Indian allottee. Not a single one of those cases involved the facts before the Court in this case—an administrative adjudication of competency; the issue of a patent in fee which extinguished the title of the United States and removed all restrictions on sale, incumbrance or taxation from the lands; and which vested specific and express

rights of citizenship and property in petitioner. In this case, the conveyance was *after* the adjudication of competency; *after* the issue and delivery of the patent in fee; *after* the title of the United States had been extinguished; *after* the restrictions had been removed; and *after* petitioner was subjected to Montana State Law. The situation is succinctly summarized by the Ninth Circuit Court:

> Appellant's argument and authorities on this issue consistently represent the natural concern of Congress and the Courts to protect Indians in the possession, enjoyment and authorized conveyance of restricted lands, but the acreage here involved falls outside that category. It is the subject of a patent in fee, the effect of which was to remove restrictions on its alienation and provide that the allottee should have the benefit of and be subject to the laws of the State of Montana.

CONCLUSION

We respectfully submit the Petition for Writ of Certiorari should be denied for these reasons:

1. The decision of the Ninth Circuit Court is wholly consistent with prior decisions of this Court considering analogous facts. The petition does not present the factual and legal conditions precedent required in Supreme Court *Rule 19(1)(b)*.

2. Petitioner cannot collaterally attack the patent in fee issued *September 15, 1955*, by the United States Government, nor collaterally change the provisions of the statute *25 U.S.C. 349* under which it was issued.

3. Petitioner cannot collaterally in this action mandamus the United States to exercise its sovereign prerogative of deciding whether or not the United States should attack the validity of the patent.

4. As long as that patent in fee of *September 15, 1955,* remains outstanding the title of the United States remains extinguished; all restrictions on sale, incumbrance or taxation were and are removed; and petitioner ever since has been, and now is, entitled to the benefit of, and subject to Montana State Law.

5. It is immaterial whether or not the warranty deed of *October 6, 1955,* was valid when executed and delivered. Nongovernmental respondents firmly believe it was. However, nongovernmental respondents in any event have acquired title under applicable Montana Law through adverse possession, and petitioner is barred by Montana Statutes of Limitation.

Respectfully submitted,

CALE CROWLEY
500 Electric Building
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R. F. HIBBS
Mutual Benefit Life Building
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APPENDIX

3. Petitioner cannot collaterally in this action mandamus the United States to exercise its sovereign prerogative of deciding whether or not the United States should attack the validity of the patent.

4. As long as that patent in fee of September 15, 1953, remains outstanding the title of the United States remains extinguished; all reservations of title, interest or encumbrance and all reservations and patents ever since has been and now is entitled to the benefit of and subject to Montana State Law.

5. It is immaterial whether or not the warranty deed of October 6, 1953 was executed and delivered. Nongovernmental respondents firmly believe it was. However, nongovernmental respondents in any event have acquired title under applicable Montana Law through adverse possession, and petitioner is barred by Montana Statutes of Limitation.

Respectfully submitted,

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INDEX OF APPENDIX

Appendix A

Excerpts from *November 5, 1919,* Hearings before a Subcommittee on Indian Affairs, House of Representatives, entitled "Indian Tribes of Montana."

Appendix B

Excerpts from page of House Congressional Record of *April 2, 1920.*

Appendix C

Senate Committee Reporter *No. 639* of *April 19, 1926, Calendar 635,* which incorporates House Report *228.*

APPENDIX A

INDIAN TRIBES OF MONTANA

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON INDIAN AFFAIRS

HOUSE OF REPRESENTATIVES

SIXTY-SIXTH CONGRESS

FIRST SESSION

NOVEMBER 5, 1919

I. (Pp. 12-13)

12 INDIAN TRIBES OF MONTANA

* * * *

MR. RHODES. Well, gentlemen, that brings us to the consideration of H. R. 9709, introduced by Mr. Riddick, which provides for

the allotment of certain lands of the Crow Tribe, for the distribution of tribal funds, and for other purposes.

MR. HAYDEN. May I ask if a similar bill has passed the Senate

MR. RIDDICK. Yes, this exact bill passed the Senate. In fact, I introduced some time ago a bill providing substantially for what this bill provides for, and after that bill had been looked over in the Senate Committee and a bill agreed upon unanimously by the Indians, by the department, by the people of Montana, and by the members of the committee, then I introduced the same bill. I changed my bill and introduced a new bill.

MR. HASTINGS. You say this bill passed the Senate?

MR. RIDDICK. Yes.

MR. HASTINGS. What is the number of the Senate bill?

MR. MERITT. Senate 2890.

MR. RHODES. We have not that here.

MR. HASTINGS. Yes, we have.

MR. HAYDEN. Mr. Chairman, we will not report anything out of this committee except Senate 2890,

which has passed the Senate, so we might as well work on that bill from the beginning.

MR. RHODES. I think so.

MR. HASTINGS. It passed the Senate on October 23d.

MR. RHODES. Suppose, then, we let Mr. Ridick proceed with the Senate bill. You may proceed, Mr. Riddick.

II. (Pp. 16-17)

16 INDIAN TRIBES OF MONTANA

* * * *

MR. HASTINGS. Let me ask Mr. Merrit, if you will pardon me, about how many Indians are in the Crow Tribe?

MR. MERITT. One thousand seven hundred.

MR. HASTINGS. About how many of these speak English?

MR. MERITT. About 50 per cent.

MR. HASTINGS. Have any of them been adjudged competent?

MR. MERITT. Yes, sir.

MR. HASTINGS. About how many?

MR. MERITT. I think there are about 200 Indians on the Crow Reservation who have patents in fee —between 200 and 300 Indians.

MR. HASTINGS. That is a small per cent.

MR. RIDDICK. One thousand seven hundred takes in the infants as well as the adults. That is a large percentage of the adults, is it not.

MR. HASTINGS. Those 200 are all adults, of course?

MR. MERITT. Yes, sir.

MR. HASTINGS. About how many adults are there of the 1,700, Mr. Riddick? Are some of these educated and good business men?

MR. RIDDICK. Yes, indeed; yes sir.

MR. HASTINGS. Competent?

MR. RIDDICK. Yes, sir.

MR. HASTINGS. Patents have been issued to them?

MR. RIDDICK. Yes, sir.

MR. HASTINGS. And this is their property?

MR. RIDDICK. Yes, sir.

MR. HASTINGS. They are citizens of the United States?

MR. RIDDICK. I can not tell whether they are or not.

MR. HASTINGS. Are they allowed to vote?

MR. RIDDICK. I think not.

MR. MERITT. Some of them are citizens, and some are not.

MR. HASTINGS. They are when a patent is issued?

MR. MERITT. Yes, sir.

MR. RHODES. All those to whom fee patents have been issued are citizens of the United States, are they not?

MR. MERITT. Yes, sir.

III. (Pp. 39-40)

INDIAN TRIBES OF MONTANA 39

* * * *

MR. MERITT. Secretary Lane prefers that the bill should be amended so far as it relates to the power site on the Crow Reservation.

MR. HASTINGS. Well, that is section 10 we had up. (Pertaining to power sites)

MR. MERITT. Yes, sir.

MR. HASTINGS. Well, you have heard the amendment I suggested, to the effect that they be approved by the Secretary of the Interior; what do you say about that?

MR. MERITT. The Secretary, of course, would prefer that the power be vested in the department rather than have the power vested in the tribal council, to determine the action that it might want to take.

MR. HASTINGS. Then, you take away all initiative from the Indian and from the council, no matter how many competent Indians there may be or how many competent Indians had passed on this matter, is that the department's view of it?

MR. MERITT. The department would prefer that the provision in the water-power bill should govern in leasing this power site, rather than to have an exception made in the provisions in this Crow bill.

MR. HASTINGS. Well, if we pass it, this Crow bill now, and if we passed the other one, it would appear that this would conflict with it. If we have some legislation in the water-power bill which is not yet passed—it has passed the House, but has not passed the Senate—if this passed, if we had a law, and then a subsequent law was passed which conflicted with it, it would repeal it to that extent.

MR. MERITT. I believe that, as a matter of law, if the general water bill should pass after this legislation has passed, that this would be considered as special legislation applicable to the Crow Reservation, and, therefore, the general water-power bill would not apply.

MR. HAYDEN. Let's get the facts about this water-power site. In the first place, I suppose there are about a thousand adult Indians of the Crow Tribe, of whom 200 are competent?

MR. MERITT. Between 200 and 300 have already been declared competent, and probably others will be declared competent.

MR. HASTINGS. How many are there?

MR. HAYDEN. About 1,000 adults—

MR. MERITT. I think there are considerably fewer than 1,000 adults.

MR. HAYDEN. Anyhow, a majority of the adult members of the Crow Tribe are incompetent.

MR. HASTINGS. I think that is important. He says about 200 are competent. Now, I want to know how many adults are incompetent, so that we can get at this proposition. There is a big difference between 200 and 400 or 500 or 600 out of 1,700.

MR. MERITT. There are 1,703 Indians on the Crow Reservation, and 407 of them are of school age.

Now, the paper before me does not give the number of Indians who are adults and who are minors.

MR. HASTINGS. Well, anyway, we can approximate it. The nearest approximation is that the Indians will consist of about one-fifth of the area of land affected by this water-power site, and that the Federal Government, through its ownership of public lands and public owners will be interested in the other four-fifths. Therefore, there is a danger that a majority of the Indians of this tribe are incompetent—and the Indians of this trible would have the control of the disposition of

a water-power site, in which they have but a 20 per cent interest. Now, under those exceptional circumstances, it seem to me that the Secretary of the Interior could be given full authority to dispose of this matter, which would not be true if the entire project belonged to a tribe of Indians, a majority of whom were competent. Now, what does the general law provide, so far as it affects the Indians; how does it affect the individual Indian, and how does it affect the white man; how does the general law affect them?

MR. HAYDEN. If private property is taken for public use, for the erection of a dam, or an irrigation project, or where land is inundated by the construction of a reservoir, the Government, in constructing the project, or the lessee, would have to compensate the private land owner for the value of his propery, either by agreement between them, or else the damage would be fixed by condemnation proceedings in court.

MR. HASTINGS. Now, suppose that some of the competent Indians had been allotted land which would be affected?

MR. HAYDEN. If such Indians are citizens of the United States, they would be treated exactly the same as white men. They would either have to agree upon the value of the property taken from them, or else it would have to be determined by condemnation proceedings. There is no question about that.

APPENDIX B

CONGRESSIONAL RECORD—HOUSE

1920 April 22 5999

* * * *

MR. RHODES. Mr. Chairman, I yield eight minutes to the gentleman from Montana (Mr. Riddick), the author of the bill..

MR. RIDDICK. Mr. Chairman, S. 2890 as amended by the House Indian Committee is substantially the bill I introduced as H. R. 9709. It provides for the allotment of lands and other property belonging to the Crow Indian Tribe in Montana.

The Crow Indian Reservation is in the southeastern part of Montana. It is a small empire in extent, being nearly four times the size of the State of Rhode Island. It is a historic spot, the scene of Custer's last stand. It is a beautiful country with snow-capped mountains, picturesque valleys, and rolling plains. Its soil is fertile and it is well watered with mountain streams. Its grasses are so plentiful and so nutritious that the cattle which feed there are reported to be the finest grass-fed cattle that reaches the Chicago market. This vast and rich territory, comprising nearly 2,000,000 acres, is occupied and owned in common by the 300 Indian families who reside there. There are about 1,700 of these Indians, all told, including adults and children.

In addition to owning this land in common there is also a tribal herd of cattle numbering more than 15,000 head. There is money in the bank belonging to this tribe of Indians amounting to over a quarter of a million dollars.

These Indians are held as wards of the United States Government, and their business is looked after for them under the direction of the Commissioner of Indian Affairs, in the Department of the Interior.

Although this tribe of Indians is possessed of great wealth, if one would visit this reservation one would see little evidence of prosperity or comfort. The Indians, most of them, live in poorly constructed shacks. They spend a great deal of their time in idleness or play, there being little individual incentive to go to work, and the population is decreasing.

A great many of these Indians are competent to look after their own personal and business affairs. They have had the privilege of years of schooling and of commingling with their white brothers in cities and towns and among neighborhood ranches.

Some of these Indians have great wealth in their own right. Some are among the best-educated Indians in the country. The Indians are all dissatisfied with the present arrangement. For many years they have held frequent council meetings and have decided that they want to each own his own property in his own right. They do not want to longer be wards of the Government. They desire full citizenship and to stand on their own resources as soon as they are able to do so.

The simple purpose of this bill is to equitably divide this land and this other property, held in common by the tribe, and to give to each Indian his individual share, and to determine what Indians are fully capable of administering their own affairs. The bill provides that those who are competent shall be placed upon their own resources and be given all their property and all the rights and privileges of citizenship under proper safeguards. It also provides for those not yet fully competent, and that these may as rapidly as possible be made independent of the guardianship exercised over them by the United States Government, and be given that individual responsibility which is the ultimate achievement aimed at in the proper settlement of what is known as the Indian problem. This has been the wise and consistent policy of Congress in the past.

In the opinion of the Indian Committee, which recommends the passage of this bill, the Crow Indians

have now reached a position where the ownership of their land and their property can be safely intrusted to them.

Exhaustive hearings have been given on this bill, both by the Senate Indian Committee and by the House Indian Committee.

Delegates of the Crow Indian tribe have been present at these committee meetings and are now here in Washington, and are unanimous in expressing the earnest desire that the Congress shall pass this bill in its present form as promptly as possible.

Ex-Secretary Lane, who was Secretary of the Interior when the hearings were begun upon this measure,

CONGRESSIONAL RECORD—HOUSE
6000 April 22,

asked that a certain amendment recommended by him should be incorporated in the bill, and with this change recommended its passage. This amendment recommended by Secretary Lane is one of the committee amendments now incorporated in the bill. Every member of the Indian Committee favors the passage of this bill. The Indian Department has cooperated with the Indian Committees of both the Senate and the House and the Crow delegates from the Crow council, and all have agreed upon the bill in its present form and recommend its passage.

* * * *

CONGRESSIONAL RECORD—HOUSE
6006 April 22,

* * * *

THE CHAIRMAN. Yes. Two minutes of the time remain.

MR. RHODES. Mr. Chairman, if the commit-

tee will permit. I desire to make a brief statement during this two-minute period.

In the first place, I am a member of no committee that has devoted as much time to the consideration of any one bill of this character as has been devoted to the bill under consideration. In the first place, both the Senators from the State of Montana appeared before the committee last October urging this legislation. The bill had already passed the Senate, and the House Committee on Indian Affairs, after having listened to a number of Indians from the reservation, decided to report the bill with certain amendments. The bill went upon the calendar, and after remaining there some time objection arose to the bill on the part of certain Indians on the reservation. Those Indians sent a delegation to Washington, and the chairman of our committee accorded that delegation an additional hearing. As the result of that hearing, the chairman of the committee withdrew the bill. The committee again considered the bill and reported it unanimously with the amendments agreed upon, which have been printed as a part of the bill now before the committee.

I desire to say, too, Mr. Chairman, that this is a very important piece of legislation, because the bill, if the committee understands the true situation, has the approval of the Crow Indians, and these Indians have reached that condition of progress and development when they should have turned over to them their property and be allowed to administer their own affairs.

* * * *

CONGRESSIONAL RECORD—HOUSE
6010 April 22,

* * * *

The Clerk read as follows: (Reading all of Section 6 pertaining to mineral ownership and leasing not in itself pertinent to this case.)

MR. WALSH. Mr. Chairman, I do not know the reasons which prompted the committee in reducing this term to 25 years, but it seems to me it would be an *unwise* thing to do. I would like to hear from the gentleman in charge of the measure.

* * * *

MR. RIDDICK. Mr. Chairman, will the gentleman yield

MR. WALSH. Certainly.

MR. RIDDICK. I think the observations of the gentleman from Massachusetts would be well taken if it were not for the fact that when these patents are issued in 25 years they will be issued in trust for the Indians if the Indians are not fully competent. On page 3, line 12, there is a provision dividing the Indians into competent and incompetent Indians, and only the competent are given the right to look after their own property.

MR. WALSH. This language is broader than that, and does not, I think, come within that requirement. It says "that at the expiration of 50 years from the date of approval of this act the coal, oil, gas, or other mineral deposits upon or beneath the surface of said allotted lands shall become the property of the individual allottee or his heirs." That means that at the expiration of that time whatever valuable deposits there are in that land shall belong to the individual Indians, irrespective of the issuance of any trust patents or by means of any trust patents.

MR. RIDDICK. This land will belong to the Indians, but the incompetent Indians will be subject to the Indian Department, just as they are now.

APPENDIX C

(Senate Report *No. 639, April 19, 1926, Calendar 635,* which incorporates House Report *No. 228.*)

* * * *

"The Committee on Indian Affairs, to whom was referred the bill (H.R. 8185) to amend sections 1, 5, 6, 8, and 18 of an act approved *June 4, 1920,* entitled 'An act to provide for the allotment of lands of the Crow Tribe, for the distribution of tribal funds, and for other purposes,' having considered the same, report favorably thereon with the recommendation that the bill do pass with the following amendment: (not pertinent)

* * * *

The facts are fully set out in House Report No. 228, Sixty-ninth Congress, first session, which is attached hereto and made a part of this report.

There is also attached a letter from the Secretary of the Interior under date of *March 17, 1926.*

(House Report No. 228, Sixty-ninth Congress, first session)

The Committee on Indian Affairs, to whom was referred the bill (H.R. 8185) to amend sections 1, 5, 6, 8, and 18 of an act approved *June 4, 1920,* entitled 'An act to provide for the allotment of lands of the Crow Tribe, for the distribution of tribal funds, and for other purposes,' having considered the same, report thereon with a recommendation that it do pass with the following amendments: (not pertinent)

* * * *

A subcommittee and your full committee have held extensive hearings on this measure and the Department of the Interior and representatives of the Crow Tribe were allowed to present a very complete case. This bill amends the act of *June 4, 1920,* and the greater part of

the language of the present bill is the same as existing law.

The proposed amendments to existing law is contained in this bill are as follows:

Section 1. This section is amended by adding the words 'as amended' for the purpose of clarifying the language to lease their lands without restrictions. It is believed by the Indians that this action will be of great benefit to the entire tribe.

* * * *

The report of the Secretary of the Interior on this bill is attached hereto and made a part of this report.

Department of the Interior
Washington, January 30, 1926

Hon. Scott Leavitt,
Chairman Committee on Indian Affairs,
House of Representatives.

My Dear Mr. Leavitt: I have your letter of *January 23, 1926,* inclosing copy of H.R. 8185 (69th Cong., 1st sess.).

This bill contemplates amending sections 1, 5, 6, 8, and 18 of an act approved *June 4, 1920* (41st Stat. L. 751-757), affecting rights of the Crow Tribe of Indians of Montana.

The first change in section 1 of the act appears in line 5 of page 3, where the words 'as amended' have been added for the purpose of clarifying in the minds of the Indians that the trust patents issued in pursuance thereto shall have the force and legal effect as prescribed by the act known as the 'General allotment act' of *Febru-8, 1887,* as amended up to the present. The addition of these two words will not in any way affect existing law.
* * * *"

PROOF OF SERVICE

I CALE CROWLEY, one of the attorneys for nongovernmental respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on *February 26, 1975,* I served three copies of this brief on:

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